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Declaration of nullity as a fundamental defect of an administrative decision (not only in the Czech Republic)

Introduction

An administrative decision itself represents a result of the application process realized by administrative bodies; it is a one-sided, authoritarian act of law application. For public administration a decision represents one of the most important forms of activity. An administrative body shall, by its decision, create, alter or abolish the rights or duties of a particular person, or it shall declare in a certain case that such a person has or does not have rights or duties, or it shall decide on procedural issues in cases stipulated by the law. Such a decision – as a manifestation and result of public power – must meet all the requirements set by legal order (compare with Art. 2 para. 3 of the Czech Constitution[1] and Art. 2 para. 2 of the Charter of fundamental rights and freedoms[2])[3]. A decision must always be issued by a competent administrative body as a result

[1] Constitution of the Czech Republic of 16 XII 1992, No. 1/1993 Coll.

[2] Resolution of the Presidium of the Czech National Council of 16 XII 1992 on the declaration of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, No. 2/1993 Coll.

[3] It is a basic and widely recognized requirement for the performance of public administration in any state governed by the rule of law – see H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, Oxford 2011, p. 151, where the authors state: "The public administration must act under and within the law, whether as contained in primary and secondary legislation or in the jurisprudence of competent courts". Similarly see M.P. Singh, *German Administrative Law in Common Law Perspective*, Berlin 2001, p. 66.

of a legal procedure and it must fulfil all statutory requirements of content and form[4].

In cases where an administrative decision does not fulfil any of the conditions which are prescribed for them by legal order, we talk about **a defective administrative decision**. An administrative decision is defective if it has legal deficiencies, not because it is unjust or it does not reflect any other non-legal values. Although the primary purpose of the legislation in each state is to ensure that each individual administrative decision will be lawful, in practice it is sometimes the case that administrative bodies make errors during the process of applying legal norms that are reflected in the defective nature of an administrative act. Czech administrative doctrine and case law try these defects to identify, categorize and describe them clearly[5].

The main aim of this article is to describe the nature of the defect of nullity and the reasons for such a defect, and also to characterize the procedures leading to the "removal" of null administrative decisions from the legal sphere of persons who may be affected by them. Attention will also be paid to the legal consequences of nullity, including the question of compensation for damage caused by a null decision. In addition to the descriptive method, the method of analysing case law relating to the nullity will primarily be used, the knowledge acquired will be generalized using the method of synthesis, the current state of *de lege lata* will be assessed and fundamental deficiencies of Czech legislation will be identified, as well as proposals *de lege ferenda* formulated.

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[4] One can then distinguish **competence, content, formal and procedural requirements for decisions** – see D. Hendrych et al., *Správní právo. Obecná část*, Praha 2012, p. 204 et seq.; V. Sládeček, *Obecné správní právo*, Praha 2013, p. 121 et seq.; or *The Administration and you. Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons. A Handbook*, Council of Europe, Strasbourg 1996, p. 13 et seq.

[5] One can distinguish defective administrative decisions by the criterion of what sources of administrative law such a decision violates – **whether it violates a constitutional, statutory or sub-statutory rules**. Following the distinction between substantive law and procedural law, one can distinguish **formal defects and material defects**. From the viewpoint of the severity of the defects one can **distinguish null decisions (non-existent) and defective, but existing decisions**, which enjoy the presumption of validity and correctness. Finally, according to how to remedy the defective administrative acts there is a division on **formally defective decisions, factually inaccurate decisions, unlawful decisions and** next to them separately **null administrative decisions**. To remedy each of these defects different legal means must be used but null decisions occupy a specific position: remedy is not possible in any way.

With the help of the comparative method, information on how nullity is solved in some other European countries (especially in Germany and Austria) will also be presented.

1. Nullity of an administrative decision (the nature of this defect and its reasons)

Nullity is based on the concept of "nothingness", which we understand as nonexistence. A null decision can be defined as non-existent: it is an act that does not exist from the perspective of law – it is "legal *nullum*". In the case of a null decision we can say that it is a legally irrelevant result in the activity of an administrative body. As **a null decision does not exist from the perspective of law, it is not able to cause any public legal effects**. A null administrative act is not able to affect the rights and duties of its recipients; rationally we apply the principle *quo nullum est, nulllum producit effectum*[6]. Null decisions are the only category of defective administrative decisions that constitute an exception to the principle of the presumption of validity and correctness of administrative acts. Therefore no one is obliged to respect a null administrative decision and follow it. On the contrary, other defective (but not null) administrative decisions are valid and until their eventual change or cancellation they have the intended legal effect. That is why nullity represents the most serious and also irremovable and incurable defect, a defect that cannot be removed or healed either by the passage of time or otherwise. The legal "quality" of something that does not exist cannot be changed just as defects of something that does not exist cannot be removed.

Foreign administrative doctrines look at the nature of the defect of nullity of an administrative act in a very similar way. German literature clearly states that "der nichtige VA [Verwaltungsakt] zeitigt keine Rechtswirkungen, er ist weder für den Betroffenen noch für Behörden oder Gerichte verbindlich…, die Nichtigkeit eines VA kann nicht geheilt werden"[7]. Nullity is understood similarly in Austrian administrative law where the nullity of an act means that the decision has not been issued, and therefore, it cannot give rise to any legal effects[8]. Furthermore, the

[6] M. Máša, *K otázce tzv. nicotných aktů*, "Správní právo" 1972, no. 3, p. 139.

[7] See K. Redeker, H.-J. von Oertzen, *Verwaltungsgerichtsordnung. Kommentar*, Stuttgart 1994, p. 188; P. Lehmann, *Allgemeines Verwaltungrecht*, Brühl 2000, p. 130.

[8] F. Koja, *Allgemeines Verwaltungrecht*, Wien 1986, p. 521.

Slovak doctrine clearly states that the nullity of an act occurs when its defects have reached such an intensity that we cannot even talk about an act; such an act cannot bind its addressees and has no legal effect, respectively, in the legal sense of the word it does not exist[9].

Nullity has not been reflected **in Czech legislation** for very long and defining the nature of nullity, its reasons, and also the process leading to the removal of a null act in the legal sphere was – until 2006 – left only to the doctrine and case law. A major step was the adoption of the Code of Administrative Procedure[10], which came into force on 1 January 2006. The Code of Administrative Justice came into force in 2003, but this only briefly regulates the practice of administrative courts in relation to the null decision and is silent about the definition of the nature of nullity, as well as its reasons.

From the perspective of the definition of nullity and the reasons for it, **§ 77 of the Code of Administrative Procedure** is nowadays essential. Paragraphs 1 and 2 of § 77 provide that:

> A decision is null if an administrative body has no subject-matter jurisdiction; this rule does not apply if the decision is issued by an administrative body superior to that having subject-matter jurisdiction. Nullity shall be ascertained and declared in the form of a decision by an administrative body superior to that which has issued the null decision.
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> A decision is null which suffers from defects causing the decision to be apparently contradictory or legally or factually impracticable, or from other defects which exclude the document from being considered to be a decision of an administrative body. Nullity due to such reasons shall be declared by a court according to the Code of Administrative Justice.

The provisions of § 77 of the Code of Administrative Procedure is relatively brief. First and foremost, it is evident that the legislator **does not define the very essence of nullity and its legal consequences**[11]. The legislator comes out only in silence and without any further justification of the conclusions that emerged from the administrative legal doctrine and case law[12]. This aspect has its positives and negatives. It is

[9] B. Cepek, *Účinky rozhodnutia vydaného v správnom konaní v nadväznosti na problematiku nulitnosti individuálneho správneho aktu*, in: *Všeobecné správne konanie. Zborník z medzinárodnej vedeckej konferencie 8.– 9. Októbra 2009 Častá-Papiernička*, Bratislava 2010, p. 141.

[10] Code of Administrative Procedure, Act of 24 VI 2004, No. 500/2004 Coll.

[11] Judgment of the Supreme Administrative Court of 13 V 2008, no. 8 Afs 78/2006-74.

[12] Conversely, the German legal order provides that a null administrative decision has no legal effect – *"Ein nichtiger Verwaltungsakt ist unwirksam"* (§ 43 para. 3 Verwaltungsverfahrensgesetz of 25 V 1976, BGBl. I S. 1253).

usually advisable if a particular term with which the legal system works is content-defined and when the legal consequences associated with it are clearly defined. This certainly reduces the problems related to the interpretation and application of the term by both public authorities and the addressees themselves, and strengthens the legal certainty and predictability of these bodies' decision-making. Conversely, a negative aspect can be seen in the fear of an eventual faulty interpretation of nullity by the addressees of decisions and possible disrespect of existing though faulty decisions for their alleged nullity. Conversely, a positive aspect is the legal definition of reasons for the nullity of an administrative decision, which can help re-define partly the essence of the nullity. It is suggested that a law (the Code of Administrative Procedure) should directly define the essence of nullity. For example, German legal order expressly provides that a null administrative decision has no legal effect – "*Ein nichtiger Verwaltungsakt ist unwirksam*" (§ 43 para. 3VwVfG). It might be said that a similar statement would be suitable for the Czech Code of Administrative Procedure[13].

It is also interesting and significant that the legislation concerning nullity and its justifications in the Czech Code of Administrative Procedure was greatly affected by the conclusions of German theory and legislation that distinguishes the general grounds of nullity and specific reasons for it[14]. German legislation governs the grounds of nullity in § 44 Code of Administrative Procedure[15]. This provision contains mainly the so-called 'general clause of nullity' (§ 44 para. 1 VwVfG) and subsequently the enumeration of special reasons for nullity mentioned in § 44 para. 2 VwVfG. According to the general clause[16], administrative acts are null if they suffer a particularly serious defect, and this defect is also evident[17]. German theory and case law is based on *Evidenztheorie*, under which a defect is evident if a layman familiar with the basic facts

[13] The same opinion is held by Lukáš Potěšil – see L. Potěšil, *Nicotnost a správní rozhodnutí ve středoevropském kontextu*, Brno 2015, p. 153.

[14] Not every piece of legislation includes a general clause of nullity – see, for example, Austrian legislation, which contains only the specific reasons for nullity (§ 68 Allgemeines Verwaltungsverfahrensgesetz, BGBl. Nr. 51/1991).

[15] Verwaltungsverfahrensgesetz vom 25 V 1976 (BGBl. I S. 1253), hereinafter „VwVfG".

[16] "Ein Verwaltungsakt ist nichtig, soweit er an einem besonders schwerwiegenden Fehler leidet und dies bei verständiger Würdigung aller in Betracht kommendem Umstände offensichtlich ist" (§ 44 para. 1 VwVfG).

[17] See Judgment of Supreme Administrative Court of 12 III 2013, no. 7 As 100/2010-65, or Judgment of Supreme Administrative Court of 13 V 2008, no. 8 Afs 78/2006-74.

of the case concludes that the administrative act must be non-existent[18]. In addition to this general clause, § 44 para. 2 VwVfG defines six special reasons for the nullity. an administrative act is null, if:

– it was issued in writing or electronically, but the authority that issued it cannot be identified,

– it was not issued in the form prescribed by law,

– it has violated territorial jurisdiction in proceedings concerning property or rights or obligations tied to a certain place,

– it is objectively impractical, unenforceable,

– it contains a requirement that constitutes an illegality in the form of a crime or other offense,

– it contains a requirement of indecent assault.

When considering the non-existence of an administrative act, it must be first examined to ascertain whether the nullity is given by some of the special reasons of nullity and only then can we consider whether an administrative act cannot be null with regard to the fulfilment of characters of the general clause[19].

The current Czech legislation divides **the reasons for nullity** into two groups – on the basis of which of the public authorities have the competence to declare authoritatively the nullity of an administrative decision (whether it is the court or the superior administrative authority). As Potěšil or Vedral state, this division is not typical for European legislation[20]. Furthermore, it implies that both some special reasons for the nullity and also some indication of the general reason for nullity (i.e. the general clause) are specified[21].

The first reason for nullity is *de lege lata* defined as **the lack of subject-matter jurisdiction**, i.e., a decision is null if an administrative body has no subject-matter jurisdiction to issue it. An example might be a situation where the Ministry of Agriculture has decided instead of the Ministry of Environment. But if the decision is issued by an administrative body superior to that having subject-matter jurisdiction,

[18] F.O. Kopp, *Verwaltungsverfahrensgesetz,* München 1983, p. 629–631.

[19] See W. Finke et al., *Allgemeines Verwaltungsrecht*, Hamburg 2006, p. 187.

[20] L. Potěšil, *Nicotnost…*, p. 155; J. Vedral, *Správní řád. Komentář*, Praha 2012, p. 662–672.

[21] K. Frumarová, *Nicotnost správního rozhodnutí*, Praha 2015, p. 97; identically M. Kopecký, *Nicotná správní rozhodnutí (zejména z pohledu teorie a praxe českého správního práva)*, "Právny obzor" 2007, no. 4, p. 349–350; or J. Staša, *Poznámky k úpravě nicotných rozhodnutí v novém správním řádu*, in: *Nový správní řád zákon č. 500/2004 Sb., správní řád*, ed. by V. Vopálka, Praha 2005, p. 196–197. See also the opposite view of Czech case law in Judgment of Supreme Administrative Court of 13 V 2008, no. 8 Afs 78/2006-74.

such a decision is not null[22]. A decision is also null if it suffers from defects causing the decision to be **apparently contradictory or legally impracticable or factually impracticable**. These are further, explicitly enshrined special reasons for nullity. An apparently contradictory decision is a decision which is meaningless, unintelligible, and we cannot determine how the administrative authority decided (for example, the administrative authority decided that the addressee has not committed an administrative offense, but at the same time the addressee is fined for this offense). A legally impracticable decision is a decision that decides on the rights of someone who does not exist or on the thing that does not exist (for example, a building authority will decide on the removal of a house that did not exist). Finally, an example of what might be factually impracticable is a decision which requires the construction of a building in a manner that is technically impossible.

Furthermore, the Code of Administrative Procedure provides that a decision is null if it suffers from **other defects which exclude the document from being considered to be a decision of an administrative body**. Here we find the general clause of nullity, inspired by German legislation. The question is what defects of a decision can be subsumed under this clause. Here administrative doctrine and case law has helped us significantly and deduced a number of these reasons. Other reasons for nullity include: the lack of competence[23], the lack of a legal basis[24], the lack of collegiate body composition[25], the requirement of fulfilment of a criminal nature[26], the absolute lack of willingness of the administrative body[27], or the absolute lack of a form of an administrative decision[28].

De lege ferenda it is suggested Czech legislation mainly contains a 'general clause of nullity' and subsequently the enumeration of special reasons for nullity. A general clause should be explicit and clear. A suitable inspiration for the Czech lawgiver appears to be a German

[22] The lack of territorial jurisdiction does not cause nullity.

[23] For example, an administration body decided instead of a Parliament or a court.

[24] It may be a situation where an administrative body decided according to an act, which has already been canceled.

[25] For example, instead of a 5-member committee, a 3-member committee issued the decision.

[26] This means that by the performance of such a decision it would have committed a crime or administrative offense.

[27] For example, a situation where the official was coerced into issuing a decision by physical violence.

[28] A decision was issued orally instead of in writing.

general clause (see above). Moreover, special reasons for nullity should be formulated more precisely and more broadly. Frumarová suggests these special reasons for nullity:

– a lack of a legal basis for the decision,
– a decision is legally or factually impracticable,
– a decision contains a requirement for fulfilment of a criminal nature,
– incomprehensibility of a statement of decision,
– an absolute lack of willingness on the part of an administrative body or an absolute lack of any form of administrative decision[29].

2. The procedures leading to the "removal" of null administrative decisions from the legal sphere of persons who may be concerned by them – declaration of nullity of administrative decisions

A crucial question relating to the nullity is then: **whether, how and who should "remove" a null decision of an administrative body?** At first glance, such considerations may seem pointless: if it is a "legal nothing", which does not bind anyone and has no legal effect, why is it necessary to remove such a decision, by means of a legally formalized procedure, from the legal sphere of the persons concerned? The essence of the problem lies in the fact that although a non-existent decision cannot cause legal effects (*de jure*), *de facto* in many cases it can significantly interfere in the sphere of rights and duties of the persons concerned. Besides the obvious examples of null acts, there also may be administrative decisions, which are apparently defective, but the determination of the kind and nature of the defect can be very difficult, not only for the addressee of the act, but often for the administrative authority or other public authority (e.g. the court). If the addressee considers the administrative act to be non-existent, but the public authority does not, it can lead to substantial interference with the rights and duties of the recipient on the basis of a non-existent act (e.g. the execution of such a decision).

From the point of view of legal certainty it is therefore desirable to regulate by law the procedure to be explicitly and unequivocally declared that the administrative decision is non-existent. This is also the case at present in the Czech Republic. Czech legislation is based

[29] In more details see K. Frumarová, *Nicotnost…*, p. 422–435.

on the concept of divided competence for the declaration of nullity. This means that the **competence to declare nullity is given partly to superior administrative authorities and in full** (i.e. for all the reasons of the nullity), **to the administrative courts.**

The superior administrative authority is empowered to declare nullity for only one reason – for the lack of subject-matter jurisdiction. The administrative authority has the competence within 'proceedings to declare nullity', which are regulated by § 78 of the Code of Administrative Procedure, where it is stated:

> Nullity shall be ascertained and declared by virtue of office any time applicable. Participants in proceedings where such decision was issued, those mentioned in the written copy of the decision, as well as the legal successors of all those persons if bound by the decision, may initiate proceedings to declare the decision null; if an administrative body identifies no reasons to commence proceedings to declare nullity, it shall notify the filer of such a fact along with its reasons within 30 days (§ 78 para. 1).
>
> No appeal shall lie against a decision whereby an administrative body declares the nullity of a decision. (§ 78 para. 2)
>
> Where an administrative body concludes that another administrative body has carried out an act which is a null decision, it shall initiate a declaration of nullity in an administrative body competent to do so (§ 78 para. 3).

It is essential that this procedure cannot be initiated on the request of the addressee of the decision because the administrative authorities are given powers to ascertain and declare the nullity **only** ex officio, which significantly weakens the functionality of this procedure as a means of protecting a citizen before null administrative acts. A participant in proceedings may seek a declaration of nullity, for example, in Poland, where Art. 157 § 2 the Code of Administrative Procedure[30] allows nullity of the decision to be declared at the request of the parties, as well as *ex officio*. Furthermore, German legislation allows the declaration of nullity *ex officio*, as well as at the party's request, provided that the applicant has a legitimate interest in the declaration[31]. Like with the Czech legislation, Austrian legislation (§ 68 para. 4 of the Austrian Code of Administrative Procedure[32]) only permits the declaration of nullity *ex officio*. The fact

[30] Ustawa of 14 VI 1960 – Kodeks postępowania administracyjnego (unified text J.L. 2013, item 267 as amended), hereinafter "k.p.a.".

[31] F.O. Kopp, op. cit., p. 649–650.

[32] Allgemeines Verwaltungsverfahrensgesetz of 1 II 1991 (BGBl. Nr. 51/1991), hereinafter "AVG".

that nullity shall be ascertained and declared *ex officio* **anytime** may be evaluated as positive. The law sets no time limits for the commencement or termination of proceedings for the declaration of nullity, which corresponds to a fundamental attribute of a non-existent decision: this defect cannot be removed or remedied over time. Likewise, the competence to declare nullity is not limited in time in Germany[33]. In some foreign legislations, however, you can also find a different concept, where the possibility of a declaration of the nullity of administrative decisions is time-limited (e.g. § 68 para. 5 of the Austrian AVG).

If the superior administrative body concludes that the decision is actually null because of the lack of subject-matter jurisdiction, this body declares the nullity of such a decision **in the form of a declaratory decision**. The nullity of a decision is thus declared with **the effect** ex tunc, i.e. it is stated that the decision was non-existent since the time of its issuance. No appeal may be lodged against a decision, whereby an administrative body declares the nullity of a decision (§ 78 para. 2). The declaration of nullity has the same legal consequences, for example, in Poland (Art. 156 k.p.a.)[34].

Several shortcomings of this current Czech legislation can be indicated. The first serious shortcoming is apparent from the fact that a superior administrative authority may declare nullity only for one reason and only *ex officio*, which is a significant difference and limitation in the competence compared to administrative courts (compare below). *De lege ferenda* superior administrative bodies should have the competence to declare nullity for all reasons (ie. both under the general clause and all special reasons for nullity). The question is also whether to allow the initiation of this proceeding at one party's request. Another major problem is that the nullity of a decision can be found in the appeal procedure. Unfortunately, the Czech Code of Administrative Procedure does not set out rules how to deal with this situation. The Supreme Administrative Court therefore concluded that such a null decision must be cancelled, because it is essentially an illegal decision[35]. But this solution is not optimal, because the defects of lawlessness and nullity are two different defects; they have

[33] § 44 para. 5 VwVfG profides as follows: "Die Behörde kann die Nichtigkeit jederzeit von Amts wegen feststellen; auf Antrag ist sie festzustellen, wenn der Antragsteller hieran ein berechtigtes Interesse hat".

[34] W. Chróścielewski, J.P. Tarno, *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi*, Warszawa 2006, p. 190.

[35] Judgment of Supreme Administrative Court of 12 III 2013, no. 7 As 100/2010-65.

different legal consequences and also different remedies. Therefore, the best solution – *de lege ferenda* – seems to be to give the appellate authority a possibility to declare the nullity of such a decision[36]. Moreover, it is usual for foreign legislations to expressly provide procedures for declaration of the nullity of an administrative decision. Nullity, according to German legislation, can be declared at any time, *ex officio,* and also at the request of the applicant if he or she proves that he or she has a legitimate interest in it (§ 44 para. 5 VwVfG). Regarding the reason for the nullity of only a part of the administrative act, the whole administrative act can be declared as null only if that part of the act is essential to the act as a whole, and that without this part the act could never be introduced[37]. Austria is also among the states with explicit positive legislation of procedure in the case of the nullity of administrative decisions. This procedure includes § 68 AVG, where nullity may be declared by a superior administrative authority (in the exercise of its supervisory powers – this means only *ex officio*), and only for explicitly enumerated reasons. Conversely, in the Slovak Republic, for example, there is still an unsatisfactory situation in this area; the institution of nullity is still a concept which is used only by legal doctrine and the practice of the courts, and as yet is not enshrined in positive law. Therefore, with such an "act", the competent public authorities treated as with an "merely" unlawful and legally existing act and such decisions are cancelled (and nullity cannot be declared)[38].

In the Czech Republic **administrative courts may declare the nullity** of an administrative decision, and (unlike the superior administrative authority) **on all grounds of nullity**. The Code of Administrative Justice allows courts to declare nullity in the proceedings concerning a complaint against the decision of an administrative authority (§ 65 et seq.). According to § 65 of the Code of Administrative Justice, anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the preceding proceedings by a decision of an administrative body may seek the declaration of its nullity (in addition to the cancellation of such a decision). A complaint can be filed within two months of the complainant being notified of the decision, unless a special

[36] K. Frumarová, *Odvolací řízení a nicotné správní rozhodnutí*, "Právní rozhledy" 2014, no. 21, p. 725–731.

[37] In German "der teilnichtige Verwaltungsakt".

[38] Unfortunately, even according to the new Slovak Administrative Procedure Code it is not possible to declare nullity of an administrative decision. See Code of Administrative Procedure, Act of 21 V 2015, No. 162/2015 Coll.

law prescribes another time limit. Lodging a complaint does not have suspensory effect, even in the case of the alleged nullity of the contested decision[39]. In its review of the contested administrative decision the court proceeds from the facts of the case and the legal situation existing at the time of the decision-making by the administrative authority.

Proceedings before administrative courts are governed by the dispositional principle, which means that the court shall review the contested statements of the decision within the scope of counts of charge[40]. However, there are exceptions to this rule. One such exception is contained in the Code of Administrative Justice in § 76 para. 2, which states that if the court finds that the decision suffers from faults that cause its nullity, the **court declares this nullity, even without a motion**. The legislation thus stands on the concept that the court must always take nullity into account (even without the applicant's motion). If the court finds the decision null, it is obliged to declare the nullity of the decision in the statement of its judgment. If the causes of nullity concern only a part of the decision, the court declares nullity for only that part of the decision, if it does not follow from the nature of the matter that the part in question cannot be separated from the other parts of the decision[41]. It can be said that legislation relating to the declaration of nullity by administrative courts is satisfactory and no changes *de lege ferenda* are suggested.

The possibility of a judicial declaration of nullity also exists in other countries. For example, **in Poland**, according to Art. 145 of the Act on proceedings before administrative courts, these courts shall declare the nullity of a decision, for the reasons provided for in Art. 156 k.p.a. or in special laws[42]. In **Germany**, the declaratory complaint is relevant, provided for in § 43 of the Code of Administrative Courts Procedure[43]. Through this complaint one can seek the declaration of the existence or non-existence of a legal relationship or declaration of the nullity of an administrative act, if the applicant has a legitimate interest in such an early declaration[44].

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[39] But at the complainant's request the court shall by way of a resolution award suspensory effect to the complaint.

[40] See Judgment of Supreme Administrative Court of 30 IV 2008, no. 1 As 29/2008-50.

[41] For more details see L. Potěšil, V. Šimíček et al., *Soudní řád správní. Komentář*, Praha 2014, p. 700–701.

[42] E. Ochendowski, *Postępowanie administracyjne – ogólne, egzekucyjne i sądowoadministracyjne. Wybór orzecznictwa*, Toruń 2008, p. 323.

[43] Verwaltungsgerichtsordnung of 19 III 1991 (BGBl. I S. 212), hereinafter "VwGO".

[44] K. Redeker, H.-J. von Oertzen, op. cit., p. 141.

3. Legal consequences of nullity of an administrative decision

Public administration constitutes a very important part of the mechanism for exercising public power in a state. In every democratic state governed by the rule of law, the function and role of public administration absolutely requires that legislation concerning both the organization and functioning of public administration will guarantee the legal realization of its objectives and tasks. Therefore, in the Czech Republic, the performance of public administration is strictly governed by the principle of legality, which is – for the performance of public administration – one of the most important principles of all. In light of all the foregoing, it can therefore be unambiguously stated that **null administrative decisions represent a breach of the principle of legality**, a breach by particularly serious, "qualified" means.

The principle of legality is closely associated with the principle of legal certainty and the principle of citizens' confidence in law. In the area of decision-making by public authorities, this principle is reflected in the so-called **principle of presumption of validity and correctness of a decision issued by a public authority**. This principle means that the administrative act is to be regarded as flawless until the opposite is officially established. It is a rebuttable legal presumption (*praesumptio iuris tantum*) of the validity and correctness of a decision, up until the contrary is proved. Therefore, a decision that is defective is valid and may come into force and be executed, until this validity is removed by a competent authority (until it is changed or cancelled). Moreover, the Czech Code of Administrative Procedure is clear: a legally effective decision shall be binding on participants and on all administrative bodies (§ 73 para. 2). But one essential exception to this principle applies: this principle does not apply to null decisions, to those which suffer the most serious defects. From the above it follows that a non-existent decision constitutes very substantial interference with the principle of the legal certainty of the addressee of such an act, as well as of other persons, and it is in stark contrast to the legitimate expectations of the parties concerned in the negotiations and acts of public authorities. At the same time, one can say that the issue of non-existent decisions also represents a contradiction to the concept of public administration as a public service. It can be summarized that the issue of a null decision constitutes a serious contradiction and violation of various fundamental

principles that control the performance of public administration in any democratic state governed by the rule of law.

As to the legal effects of the non-existent administrative act there is a consensus both in doctrine and practice that a null administrative decision cannot oblige anyone, i.e. that such a decision cannot cause any legal consequences. Nevertheless, besides obviously null acts, in practice such administrative decisions may arise which exhibit a defect, but determining the nature of the defect and its consequences may lead to the assessment of legally complex issues. Therefore, differentiating between a null and otherwise defective decision can be very difficult, not only for the addressee of such an act, but often for the administrative or another public authority, too. This may lead to a situation where the nullity of a "non-existent" administrative act is not clear and the addressee and the recipient will exercise his right or fulfil his duty, although that duty was not imposed, or that right was not granted, because the decision is non-existent.

In such a situation, it is necessary, when assessing the behaviour of the recipient of non-existent administrative act, to respect the principle of legal certainty and the protection of the confidence of citizens in acts of public power, as well as the principle of responsibility for the exercise of public authority. In a case where the addressee will begin to exercise his ostensible right, it is necessary to take account of the fact if he did so in **good faith**[45]. Here it is necessary to emphasize that legitimate expectations or legal certainty cannot arise from the infringement; one may refer to the old principle *iniuria ius non oritur* (from injustice a right cannot emerge)[46]. Therefore, in a situation where the addressee does not act in a good faith, one can evaluate his conduct as unlawful. It may also be the case that on the basis of a non-existent act some public benefit will be paid to the addressee. In such cases Czech law provides the competence of an administrative authority to decide on an obligation to repay the amount paid in excess of the correct amount.

There may also be situations where the addressee of a null administrative act fulfils the obligation that was "imposed" by such an act, or where fulfilment of such obligations was enforced by a public authority.

[45] See Judgment of Constitutional Court of the Czech Republic of 9 X 2003, no. IV. US 150/01.

[46] See Judgment of Supreme Administrative Court of 25 IV 2012, no. 1 As 127/2011-110.

For example, a null administrative act "ordered" the removal of a building and the recipient of such an act fulfilled this obligation and removed it. It is clear that in such a case the state, or its respective territorial government units must assume responsibility for the damage caused by the exercise of public power (refer to details below). A non-existent decision may also impose an obligation to pay tax, duty, a fee, or a penalty into the public budget. If the recipient of this monetary obligation does not meet it and the competent body executes such a decision, then liability for any damage caused by the exercise of public authority will again be enforced.

Thus, as follows from the above, even **a null administrative decision may cause damage**. If the damage is caused as a result of a non-existent administrative act, there is no doubt about the fact that the damage was caused within the exercise of public power. Hence, such a situation falls under Art. 36 para. 3 of the Charter of Fundamental Rights and Freedoms, which provides that everybody is entitled to compensation for damage caused by an unlawful decision of a court, other state bodies, or public administrative authorities, or as the result of an incorrect official procedure. The conditions thereof and detailed provisions are set by law, specifically Law no. 82/1998 Coll., on the liability for damage caused within the exercise of public authority by an unlawful decision or by an incorrect official procedure. Liability under this Law is construed as strict liability (liability regardless of fault and without the possibility of liberation). The responsible entity is the State, and, secondly, territorial self-governing units (i.e. municipalities and regions) and those are responsible for unlawful decisions or for the incorrect official procedure. The Law allows both property damage and non-pecuniary damage to be replaced. Unfortunately, legislation is silent about the categories under which responsibility for null decisions should be subsumed, and opinions differ greatly on this matter. The Supreme Court of the Czech Republic takes the view that liability for damage caused by a null decision equates to liability for damage caused by an unlawful decision and nullity is seen as qualified unlawfulness[47]. Conversely, administrative doctrine is rather inclined to conclude that this is the liability for incorrect official procedure. For example, L. Potěšil believes that the issue of a non-existent act must be subsumed under the incorrect

[47] See Judgment of Supreme Court of the Czech Republic of 26 I 2011, No. 25 Cdo 3375/2008.

official proceedings and not under the unlawful decision, because a null decision is not a decision at all, it is a legally non-existent act[48]. Such a conclusion seems justified[49].

Conclusions

It can be stated that in the Czech Republic and other European countries an administrative decision represents one of the most important forms of public administration. The legislation of each country therefore sets out requirements for the content, form, and process of issuing an administrative decision. These requirements must be respected by the competent administrative authorities. However, in practice there are situations where decisions suffer from some defects, with nullity representing the most serious defect of an administrative decision. It is an irremovable defect: no correction of a non-existent administrative act (e.g. a change or cancellation) is possible. It can be only authoritatively declared that such an act is null if it contributes significantly to legal certainty. A major deficiency in Czech administrative law was therefore the fact that nullity has not been reflected in Czech legislation for very long and that attention to this issue was paid only by the doctrine and case law. The changes that occurred in 2003 and 2006, when the Code of Administrative Justice and the Code of Administrative Procedure were adopted in the Czech Republic, were assessed positively because these laws specifically regulate the reasons and procedure for declaring the nullity of an administrative decisions by superior administrative bodies and administrative courts. In relation to the legal regulation of reasons for nullity, it should be appreciated that the combination of general clause and special (certain enumerated) reasons of nullity were chosen. At the same time, another positive aspect is that if property damage or non-pecuniary damage is caused by a null administrative decision, everybody is entitled to compensation for such damage and can exercise this right towards the Czech Republic or territorial self-governing units (municipalities and regions). But one should regard the following as the most important reason: administrative authorities should always

[48] L. Potěšil, *Vyslovení a prohlášení nicotnosti správního rozhodnutí*, "Právní fórum" 2006, no. 12, p. 434. See also Judgment of Supreme Administrative Court of the Czech Republic of 28 VII 2011, no. 7 As 100/2010-46.

[49] K. Frumarová, *Nicotnost*…, p. 450–452.

proceed in issuing a decision in accordance with all laws of the Czech Republic and they should avoid any violation of the law and other defects and errors. Administrative bodies should respect the principle of legality in all their activities, as well as the principle of legal certainty and legitimate expectations, because public administration should be a service to the public. In addition to the positive aspects, however, one can indicate some deficiencies in the current Czech legislation which should be *de lege ferenda* removed, and a possible and suitable inspiration may be, for example, Polish and German legislation. It is suggested that a law (the Code of Administrative Procedure) should directly define the essence of nullity. For example, German legal order expressly provides that a null administrative decision has no legal effect – *"Ein nichtiger Verwaltungsakt ist unwirksam"* (§ 43 para. 3VwVfG). It might be said that a similar statement would be suitable for the Czech Code of Administrative Procedure. Another serious shortcoming is apparent from the fact that a superior administrative authority may declare nullity only for one reason and only *ex officio*, which is a significant difference and limitation in the competence compared to the administrative courts. For example, in Poland a participant in proceedings may seek a declaration of nullity, where Art. 157 § 2 k.p.a. allows nullity of the decision to be declared at the request of the parties, as well as *ex officio*. Moreover, German legislation allows the declaration of nullity *ex officio*, as well as at one party's request, provided that the applicant has a legitimate interest in the declaration. Therefore, *de lege ferenda* superior administrative bodies should have the competence to declare nullity for all reasons (i.e. both under the general clause and all special reasons for nullity).

Another major problem is that the nullity of a decision can be found in the appeal procedure. Unfortunately, Czech Code of Administrative Procedure does not set down rules how to deal with this situation. The Supreme Administrative Court therefore concluded that such a null decision must be cancelled because it is essentially an illegal decision[50]. But this solution is not optimal, because defects of lawlessness and nullity are two different defects, they have different legal consequences and also different remedies. Therefore, as a best solution – *de lege ferenda* – seems to be to give the appellate authority a possibility to declare the nullity of such a decision. On the other hand, it can be said that Czech legislation relating to the declaration of nullity by administrative courts is satisfactory and no changes *de lege ferenda* are suggested.

[50] Judgment of Supreme Administrative Court of 12 III 2013, no. 7 As 100/2010-65.

STWIERDZENIE NIEWAŻNOŚCI JAKO KONSEKWENCJA PRAWNA WADLIWEJ DECYZJI ADMINISTRACYJNEJ (NIE TYLKO W REPUBLICE CZESKIEJ)

Streszczenie

Artykuł poświęcony jest kwestii wadliwości decyzji administracyjnej, która ma miejsce wtedy, gdy decyzja nie jest zgodna z wymogami przewidzianymi prawem. Można wyróżnić kilka typów wad, a najpoważniejszą jest ta powodująca jej nieważność. Nieważną decyzję można zdefiniować jako nieistniejącą: jest to prawnie nieistotny skutek działania organu administracyjnego. Ponieważ nieważna decyzja z prawnego punktu widzenia nie istnieje, nie wywołuje też jakichkolwiek skutków publicznoprawnych; nikt nie jest obowiązany do poszanowania nieważnej decyzji i jej przestrzegania.

Artykuł odnosi się szczególnie do istoty i natury nieważności decyzji oraz przyczyn nieważności. Autorka przyczyny te przedstawia, odwołując się do konkretnych przykładów z praktyki. Uwagę poświęca również procesowi prowadzącemu do usunięcia nieistniejącej decyzji ze sfery prawnej. Skoro nieważna decyzja administracyjna nie istnieje, nie może być ani zmieniona, ani uchylona, zatem jedyną właściwą procedurą jest autorytatywne stwierdzenie nieważności takiej decyzji. Artykuł koncentruje się na wskazaniu, kiedy nieważność decyzji może zostać stwierdzona bezpośrednio przez władze administracyjne, a kiedy przez sądy. Podnosi również kwestię konsekwencji prawnych nieważności, w tym zagadnienie szkód spowodowanych przez akty nieważne.

Powyższe problemy są analizowane głównie w odniesieniu do Republiki Czeskiej, ale celem opracowania jest przedstawienie także rozwiązań dotyczących nieważności decyzji przyjętych w niektórych innych krajach europejskich. Kwestia nieważności jest rozważana zarówno w kategoriach aktualnej legislacji, jak również doktryny i praktyki orzeczniczej. Autorka ukazuje najbardziej poważne braki w obecnym ustawodawstwie czeskim związane z kwestią nieważności decyzji administracyjnych oraz formułuje w tym zakresie postulaty *de lege ferenda*.

Słowa kluczowe: decyzja administracyjna – nieważność decyzji administracyjnej – przyczyny nieważności decyzji administracyjnej – stwierdzenie nieważności decyzji administracyjnej